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October 29, 2004

AOR 2004-43

Lawrence M. Norton, Esq.
General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

Dear Mr. Norton:

This firm serves as counsel to the Missouri Broadcasters Association ("MBA"), a voluntary association of broadcasters (collectively, the "Members") who are Federal Communications Commission ("FCC") licensees of radio and television stations located throughout the State of Missouri. The MBA submits this request for an Advisory Opinion from the Federal Election Commission (the "Commission" or "FEC") pursuant to 2 U.S.C. §437f and 11 C.F.R. §112.4(b).

Background

Pursuant to §315(b) of the Communications Act of 1934, as amended (47 U.S.C. §315(b)), the Members are required to charge certain political candidates the station's "lowest unit charge" for the candidate's commercial advertisements in the 45 days preceding certain primary elections and the last 60 days before a general election. The Bipartisan Campaign Reform Act of 2002 ("BCRA") supplemented the lowest unit charge provisions to remove the entitlement to lowest unit charge in certain circumstances. A candidate "shall not be entitled" to this rate for commercials that make a direct reference to an opponent unless the commercial includes a statement that identifies the candidate and states that the candidate has approved the communication (the "BCRA Statement").

For radio broadcasts, the BCRA Statement must consist of a personal audio statement by the candidate identifying him or herself, the office sought, and an approval of the message. In the case of television commercials, for a period of no less than 4 seconds at the end of a commercial there must appear simultaneously (i) a clearly identifiable photographic or similar image of the candidate; and (ii) a clearly readable printed statement, identifying the candidate and stating that the candidate has approved the broadcast and that the candidate's authorized committee paid for the broadcast.

If a commercial fails to meet these requirements, Section 315(b) of the Communications Act, as amended by BCRA, provides that the candidate "shall not be entitled" to receive the lowest unit rate for that commercial or any other commercial broadcast in the remaining days before the general election. Candidates must also provide written certification to each broadcast station that they will comply with these provisions.

The campaign committee of Nancy Farmer—the Democratic candidate for senator of Missouri (the "Farmer Campaign")—alleges that Missourians for Kit Bond—the political committee of her Republican opponent, Senator Christopher "Kit" Bond—failed to observe the requirements of the BCRA statement regarding one or more radio and television commercials and, therefore, is no longer entitled to the lowest unit charge. Moreover, the Farmer Campaign appears to read a new requirement into the lowest unit charge provisions by imposing a minimum rate, which it describes as the "prevailing advertising rate", that broadcasters *must* charge a candidate who has lost the entitlement to lowest unit charge. The Farmer Campaign has threatened to file a complaint with the FEC, for making an illegal corporate campaign contribution, against any station that does not immediately raise the rate for Senator Bond's media campaign expenditures from the lowest unit charge for commercials during the remaining days of the campaign season. An example of a threat leveled against television station KSHB-TV (Channel 41), Kansas City, Missouri, accompanies this request as Exhibit 1.

Some Members charged Senator Bond lowest unit charge for campaign advertisements after he lost his entitlement to receive lowest unit charge. As a public service, and in keeping with the equal opportunity requirements of the Communications Act (as discussed in more detail below), some Members wish to offer lowest unit charge to Senator Bond even though they are not obligated to do so. Because of the immediate threat that the Farmer Campaign will file complaints with the FEC against the Members for violations of 2 U.S.C. §441b, MBA seeks the Commission's Advisory Opinion on the following questions:

1. Whether offering the lowest unit charge by a radio or television station to a candidate for office who is not *entitled* to receive the lowest unit charge—due to the candidate's failure to include the required BCRA Statement in a broadcast commercial—would constitute an in-kind contribution with respect to the difference in cost between lowest unit charge and a higher charge that the station might be permitted to charge to air the candidate's advertisement?

2. Whether radio and television stations who have charged a candidate for federal elective office lowest unit charge for advertisements that air after the candidate is no longer entitled to receive lowest unit charge have a duty under BCRA to re-bill the candidate for the difference between lowest unit charge and a higher charge that the station might have been permitted to charge to air the candidate's advertisement?

Discussion

Section 315(b) of the Communications Act grants an entitlement to candidates. Broadcast stations are required to give candidates the lowest unit charge for campaign commercials, subject to certain requirements, such as the BCRA Statement. A candidate who fails to satisfy these requirements loses the *entitlement* to receive the lowest unit charge. It is logically incorrect, however, to infer from this loss of entitlement that a station is prohibited from charging the candidate the lowest unit charge.

The term "shall not be entitled to" is used in Section 315(b), as distinguished from prohibitions that are used elsewhere in the law. The Oxford English Dictionary defines "entitle" as to "give just claim or right". Webster's English Dictionary defines "entitle" as giving an "enforceable right". The loss of a right does not impose a complimentary duty on others to deny a privilege; in this case it does not impose the obligation on broadcasters to require increasing their charges to a candidate to some arbitrarily defined minimum amount.

Nowhere does the statute impose a minimum amount—or, in the terms of the Farmer Campaign, a "prevailing advertising rate"—that a broadcast station must charge a candidate. On the contrary, §315(b)(1) focuses solely on preventing stations from over-charging candidates. It specifically states that charges "shall not exceed" the lowest unit charge during periods before certain primary and general elections. The Farmer Campaign has tortured the explicit language of the statute to read in an obligation on the part of broadcasters to charge a minimum amount in those situations where lowest unit charge does not apply.

Significantly, Section 315(b)(2), which governs the rates a broadcast station may charge candidates, is entitled "Limitation on Charges" *not* "Imposition of Minimum Charge". The section states that a candidate who fails to include the BCRA Statement "shall not be entitled to receive the" lowest unit charge. This simply means that a candidate can longer insist on receiving a radio or television station's lowest unit charge. It does not mean the candidate is prohibited from receiving that rate or that there is a positive duty on a broadcaster to charge more. Broadcast stations may now decide whether to charge the candidate the lowest unit charge or some other rate in keeping with §315(b)(1)(B).

The FCC is the governmental agency charged with responsibility for applying the Communications Act, including the lowest unit charge provisions of §315(b). The FCC's implementation of the statute is set forth in 47 U.S.C. §73.1942. As is true of the statute, the rule focuses solely on maximums. Mirroring the language of §315(b)(1), §73.1942(a) states that charges "shall not exceed" specified amounts. Where the lowest unit charge is not in effect, §73.1942(a)(2) states that charges may be "*no more than* the charges made for comparable use of the station by commercial advertisers". Nowhere in the FCC's interpretation of the statute is there any reference to a minimum amount that must be charged to candidates for public office.

It should be emphasized that in broadcasting there is no such thing as a "prevailing advertising rate". Section 315(b) and 47 U.S.C. §73.1942 recognize that broadcast stations charge varying rates to commercial broadcasters, depending on the circumstances. By definition, the lowest unit charge is the lowest of those commercial rates that are charged to commercial advertisers under a similar set of conditions that define a "class" of time, without regard to frequency.

Another factor that operates against the interpretation of the Farmer Campaign is the statutorily imposed principle of equality of opportunity. Section 315(a) of the Communications Act provides in pertinent part that "If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station".

Unlike other corporate contributors, FCC licensees are required to treat all candidates alike with respect to what otherwise might be deemed in-kind contributions. Congress recognized that furnishing discounts for campaign advertisements would be consistent with a broadcast station's obligation to operate in the public interest and, therefore, would not constitute in-kind contributions. Nonetheless, making discounts, or even free time, available to candidates could be subject to abuse. Accordingly, Section 315(a) and §73.1941 of the FCC's rules, require equal opportunities to candidates for the same office. Indeed, §73.1941(b) specifically includes political advertisements among the uses that must be afforded equal treatment.

This sheds light on an important corollary to the principle of minimum unit charges advanced by the Farmer Campaign, which the Commission will wish to take into account in rendering its Advisory Opinion. If the Farmer Campaign is correct, that it is an in-kind contribution to offer lowest unit charge to a candidate who has lost his or her entitlement to lowest unit charge, then the same logic would require that it is also an in-kind contribution whenever a broadcaster offers discounts at less than lowest unit charge or donates time to candidates. This is a result that Congress never intended and would be completely inconsistent with the structure of the Communications Act, which requires broadcasters to operate in the public interest. Moreover, it is an interpretation that was rejected in Advisory Opinion 1998-17, in which the Commission opined that donation of free time by a cable operator would not constitute an in-kind contribution.

In conclusion, the MBA requests that the Commission confirm that offering the lowest unit charge for a broadcast commercial to a candidate for federal elective office who is not entitled to receive the lowest unit charge, because he failed to include a BCRA Statement, does not constitute an in-kind contribution by a radio or television station. If the Commission finds that charging lowest unit charge in these circumstances does constitute an in-kind contribution, does BCRA impose a duty on a radio or television stations to re-bill a candidate for federal elective office to whom it has continued to charge lowest unit charge following that candidate's loss of entitlement to receive lowest unit charge?

Respectfully submitted,

Gregg P. Skall
Michael H. Shacter
Attorneys to the Missouri Broadcasters Association

Enclosure

NANCY FARMER FOR U.S. SENATE

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SENT VIA FACSIMILE AND U.S. MAIL

October 1, 2004

KSHB-41 (NBC)
4720 Oak Street
Kansas City, MO 64112

Dear STATION MANAGER:

This letter is to inform you that Missourians for Kit Bond, the political committee of U.S. Senate candidate Christopher S. "Kit" Bond, is broadcasting an advertisement on your station that violates the Bipartisan Campaign Reform Act of 2002 (BCRA).

Based on this violation, Missourians for Kit Bond shall not be entitled to receive your station's Lowest Unit Charge (LUC), according to 47 U.S.C. Sec. 315 (b) (2) (D). This rate change is effective for all broadcasts on your station from the date the advertisement in violation first aired to the end of this election cycle.

2 U.S.C. 441d (d) (1) (B) states that a candidate who refers to his opponent in a television broadcast must use one of two disclaimers:

> "...a statement that identifies the candidate and states that the candidate has approved the communication. Such statement–
>
> (i) shall be conveyed by–
> (I) an unobscured, full-screen view of the candidate making the statement, or
> (II) the candidate in voice-over, accompanied by a clearly identifiable photographic or similar image of the candidate;"

Congress' purpose in passing this portion of BCRA was to require candidates who run attack ads to stand by their ad. Missourians for Kit Bond's advertisement contains a voice-over but **fails to include a clearly identifiable image** of Senator Bond. CFR 110.11 (c) (3) (ii) (B) states:

> "A photographic or similar image of the candidate shall be considered clearly identified if it is at least eighty (80) percent of the vertical screen height."

The broadcast aired by Missourians for Kit Bond fails to meet this mark by any measure: 1) Senator Bond is not speaking into the camera; and 2) his image occupies less than fifty percent of the vertical screen height. Moreover, during the voice-over disclaimer, Senator Bond is confusingly pictured in a group of men and is by no means clearly identifiable. It is impossible for someone unfamiliar with the Senator to identify him among this group. In this way, Missourians for Kit Bond has clearly violated the letter and the spirit of the law, which is meant to force candidates who sponsor negative broadcasts to clearly identify themselves to voters.

Paid for by: *Nancy Farmer for U.S. Senate*

The penalty for this violation is unambiguous. **According to 47 U.S.C. Sec. 315 (b) (2) (D), a single violation of this campaign finance law means a committee can no longer receive LUC for the medium in which the violation occurred for the duration of this election cycle.** The law states:

"(A) In general

In the case of a candidate for Federal office, such candidate shall not be entitled to receive the rate under paragraph (1)(A) for the use of any broadcasting station unless the candidate provides written certification to the broadcast station that the candidate (and any authorized committee of the candidate) shall not make any direct reference to another candidate for the same office, in any broadcast using the rights and conditions of access under this chapter, unless such reference meets the requirements of subparagraph (C) or (D).

"(B) Limitation on charges

If a candidate for Federal office (or any authorized committee of such candidate) makes a reference described in subparagraph (A) in any broadcast that does not meet the requirements of subparagraph (C) or (D), such candidate **shall not be entitled to receive the rate under paragraph (1)(A) for such broadcast or any other broadcast during any portion of the 45-day and 60-day periods described in paragraph (1)(A), that occur on or after the date of such broadcast**, for election to such office.

"(C) Television broadcasts

A candidate meets the requirements of this subparagraph if, in the case of a television broadcast, at the end of such broadcast there appears simultaneously, for a period no less than 4 seconds-- (i) **a clearly identifiable photographic or similar image of the candidate**; and (ii) a clearly readable printed statement, identifying the candidate and stating that the candidate has approved the broadcast and that the candidate's authorized committee paid for the broadcast." [*Emphasis added*]

Our legal counsel has advised that I request written confirmation from your station indicating receipt of this correspondence and the action you have taken in response to this violation. Continuing to afford Missourians for Kit Bond LUC following this violation may constitute a corporate campaign contribution in the amount of the difference between your station's LUC and the prevailing advertising rate. If you decide not to abide by federal law, 2 U.S.C. Sec. 441b, which prohibits corporate contributions to federal candidates, our committee will immediately file a complaint with the Federal Elections Commission and Federal Communications Commission.

Thank you for your cooperation and your attention to this matter. I am available to answer any questions at your convenience.

Sincerely,

Sallie Stohler
Campaign Manager

Ad Watch: Bond TV Attack on Taxes

Visuals	*Audio*
"Nancy Farmer High Tax Agenda" "Not Mainstream Missouri"	Nancy Farmer's high tax agenda is not mainstream Missouri.
"Nancy Farmer High Tax Agenda" "... one of the largest tax increases in state history"	Farmer supported one of the largest tax increases in state history
"Nancy Farmer High Tax Agenda" "... 54 high tax votes" Picture of Farmer with Howard Dean	Voted for higher taxes 54 times
"Nancy Farmer High Tax Agenda" "... deny the right to vote on major tax increases."	To deny Missourians the right to vote on major tax increases
"Holden-Farmer High Tax Agenda" "... higher taxes that killed jobs" Picture of Farmer and Bob Holden	Farmer supported Bob Holden's high tax agenda that killed jobs
"BOND" "MIDDLE CLASS TAX RELIEF"	Kit Bond is fighting for middle class tax relief
"BOND" "END MARRIAGE TAX PENALTY" "END DEATH TAX PENALTY"	To eliminate the unfair tax penalty on marriage and kill the death tax
"BOND" "LOWER TAXES" "JOBS FOR MISSOURI"	Lower taxes to help small businesses create jobs in Missouri
"KIT BOND" "SECURING OUR FUTURE"	Kit Bond, securing our future
"KIT BOND" "U.S. SENATE"	I'm Kit Bond and I approved this message

"Nancy Farmer's high tax agenda is not mainstream Missouri. Farmer supported one of the largest tax increases in state history, voted for higher taxes 54 times, to deny Missourians the right to vote on major tax increases. Farmer supported Bob Holden's high tax agenda that killed jobs.

Kit Bond is fighting for middle class tax relief, to eliminate the unfair tax penalty on marriage and kill the death tax, lower taxes to help small business create jobs in Missouri. Kit Bond, securing our future."